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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 580

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a Corporation,

Petitioner,

vs.

WILLIAM J. WOODROW,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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To the Honorable Supreme Court of the United States:

The petitioner, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Minnesota entered in the above entitled cause on the 4th day of December, 1953.

OPINION BELOW

The opinions of the Minnesota Supreme Court (R. 646-661 and R. 699) are respectively reported at 60 N. W. (2d) 49 and 61 N. W. (2d) 240, but are not as yet reported in the Minnesota reports. (For purposes of clarity, the petitioner and respondent herein will be referred to as defendant and plaintiff, respectively.)

JURISDICTION

This action was brought under the Federal Employers' Liability Act, Title 45 *U. S. C.*, Sections 51-60, to recover damages for alleged personal injuries claimed to have been sustained by plaintiff while employed by defendant as a locomotive engineer.

The jurisdiction of this Court is invoked under Title 28 *U. S. C.*, Section 1257(3) and upon the grounds that the question presented is wholly of a Federal nature and of peculiar gravity. It relates to the right of a *defendant* in a Federal Employers' Liability Act action to trial by jury. This right was denied by the trial court when over defendant's objection (R. 482-483) it withdrew from the jury's consideration testimony of three witnesses, one a city police officer and one a deputy sheriff, which established that the disabilities plaintiff complained of at the time of trial were caused in whole, or at least in part, by injuries received in a serious automobile accident two years after his alleged railroad injury and three and one-half months before the trial. The trial court's action was assigned as error in defendant's motion for a new trial (R. 620) which was denied (R. 637, 638).

The question was specifically raised on appeal to the Minnesota Supreme Court from the intermediate order below denying defendant's right to jury trial and was decided adversely to defendant (R. 658). The issue was again raised in defendant's petition for rehearing (R. 692) and defendant's right was denied (R. 693).

When judgment was entered in the trial court, defendant then appealed the judgment to the Minnesota Supreme Court (R. 695) where the question was again raised (R. 696). The judgment of the lower court was affirmed by decision of the Minnesota Supreme Court of December 4, 1953 (R. 699), thereby constituting final judgment of the highest court of the State of Minnesota.

QUESTION PRESENTED

In an action under the Federal Employers' Liability Act where the defendant has contested the happening of plaintiff's alleged accident, as well as the nature and extent of plaintiff's alleged injuries, *is the defendant entitled to have the jury consider and pass upon a vital, disputed issue of fact* as to whether the plaintiff was involved in a serious automobile accident, resulting in the personal injury to him for which he seeks to recover herein, and which occurred more than two years after the time of the claimed railroad accident and several months before the time of trial?

STATUTES INVOLVED

Title 28 *U. S. C.*, Section 1257(3).

Title 45 *U. S. C.*, Sections 51-60.

STATEMENT OF THE CASE

This action was commenced on October 30, 1951, to recover damages for personal injuries claimed to have been sustained by plaintiff on November 12, 1949, while employed by defendant as a locomotive engineer (R. 3, 4). In the complaint two years after the accident the plaintiff for the first time claimed the shaker bar came off the grate lug and caused the accident (R. 4). This was entirely different from his earlier statements.

Defendant denied both liability and the extent of the alleged injuries (R. 7, 8). The case was tried commencing March 3, 1952, in the District Court of Freeborn County, Minnesota, before the Court and a jury (R. 11).

Plaintiff testified that he was 52 years old, a resident of Ottumwa, Iowa, and that on November 12, 1949, he was on duty as engineer of one of defendant's freight trains from Laredo, Missouri, to Ottumwa, Iowa (R. 12, 15, 21). The

engine did not steam well (R. 22), because of the inferior grade of coal that it was necessary to burn due to the national coal strike in progress (R. 449, 454). As a result it was necessary for the fireman, Robert Boyd Jr., to periodically "clean the fire" by opening and closing the engine grates, and removing the clinkers (R. 23, 24). At Powersville, Missouri, plaintiff volunteered to clean the fire for Boyd (R. 26). The engine was stopped and Boyd went down to the ground, leaving plaintiff alone in the cab of the engine (R. 27). Plaintiff then cleaned three of the four sets of grates in the engine (R. 28). This was done in the customary manner by placing the grate shaker bar upon the grate lug and then shaking or moving the grates open and closed (R. 17, 27, 28, 29). Plaintiff does not claim to have experienced any difficulty in cleaning the first three sets of grates. He then proceeded to clean the fourth set of grates (R. 28). He placed the shaker bar on the grate lug in the regular manner (R. 28, 29) and testified that the shaker bar was down on the lug as far as it would go (R. 29). There was some slack in the shaker bar (R. 29).

Plaintiff testified that he then opened the grates by moving the shaker bar *backward toward the tender* (R. 28). With the shaker bar in this position, plaintiff claims to have cleaned the clinkers out and shoved the live coal ahead onto the front section of the grates with a "slide hook" (R. 29). After having done this, it was his claimed intention to *close* the grates by moving the shaker bar *forward* toward the boiler head (R. 29, 30). Plaintiff claims that the grate rods were sprung, bent or otherwise (R. 30), although he could not see them (R. 99, 100), and that it was therefore necessary for him to grasp the top of the shaker bar and pull it *forward* with all his strength in the direction of the boiler head, whereupon the shaker bar suddenly came off the grate lug throwing him against the boiler head and causing the

injury to his back for which the action was brought (R. 30, 31).

It is defendant's position that plaintiff's self-serving testimony which alone supports his claim is wholly incredible and inconsistent with the physical facts established by all the other evidence which demonstrates that it was not only improbable but physically *impossible* for plaintiff to have been injured in the manner claimed.

Plaintiff was contradicted by the testimony of his own son, William E. Woodrow, Jr., plaintiff's witness, as well as the testimony of witnesses Brossard and Corr, *all of whom stated that the physical construction of the engine was such that the grates opened by moving the shaker bar forward toward the boiler head and closed by moving the shaker bar backward toward the tender* (Woodrow, Jr., R. 547, 548; Brossard, R. 232, 240; Corr, R. 441, 446). The grates could be forced open only from one to three inches, depending on the condition of the engine, with the shaker bar in the backward position (R. 545), but with such a narrow opening it would have been impossible for plaintiff to have knocked out the clinkers and shoved the live coals ahead onto the front section of the grates as he claims that he did (R. 29). The shaker bar, therefore, must have been in the *forward* position in order for the grates to be open wide enough for plaintiff to knock out the clinkers and rebuild the fire, and it was thus physically impossible for the accident to have taken place in the manner claimed by plaintiff.

The physical design of the housing at the base of the shaker bar is such that when it is engaged or placed over the tapered protruding shaker stub or grate lug it is necessarily wedged on in such a manner that it cannot be removed except by pulling straight up. Even then it must frequently be pounded or hammered before it can be pulled directly up from the stub since the inside surface of the housing presses against and

opposes the exterior tapered surface of the shaker stub (R. 19, 20, 155, 156, 234, 237).

Further doubt is cast on the happening of the alleged accident by the fact that plaintiff made no mention of the alleged accident or injury nor of the allegedly defective condition of the grate shaking apparatus to Robert A. Thomas, the conductor in charge of the train movement (R. 219-221).

Although required by company rules to report every engine defect at the end of each run, plaintiff made no reference whatsoever to the grate shaking apparatus being defective on his engine condition report made at the end of the run on November 12, 1949 (R. 97-99, Ex. C).

Fireman Boyd used this grate shaking apparatus on all four grate lugs many times on November 12, 1949, both before and after plaintiff claims to have been injured, and had no trouble whatsoever with it (R. 156, 164).

Fireman Storey had used the grate shaking apparatus on this engine on numerous occasions before and after November 12, 1949, and had never observed a defect in the apparatus nor had he found it to function improperly (R. 191, 192).

In January, 1950, plaintiff explained to Dr. Householder how the alleged accident occurred and in so doing made no reference to the shaker bar having come loose, nor did he state that he had been thrown against the boiler head of the engine (R. 265). Instead, it was his story at that time, that while bent forward shaking the grates he felt a sudden and unexplainable pain in his back (R. 264, 265).

In June, 1950, plaintiff described the occurrence to defendant's claim agent McLaughlin and said, "There was nothing defective about the shaker bar, grates or other parts and the shaker bar didn't come loose; engine was standing still" (R. 485, 486, 492, 493).

It was not until this action was started, almost two years after the alleged railroad accident, that plaintiff started

claiming that the grate shaking was defective and that he was thrown against the boiler head.

Immediately following the alleged railroad accident, plaintiff continued on duty to the end of the train's run at Ottumwa (R. 34). The next day he visited Dr. Nelson at Ottumwa who taped his back, administered some medication and advised the use of hot packs (R. 35, 36). Plaintiff continued working without interruption until December 23, 1949, at which time he laid off (R. 37). On January 18, 1950, he was admitted to the Wesley Memorial Hospital in Chicago on the basis of his subjective complaints of pain in the sacro-iliac region which extended down over both buttocks into the region of the scrotum and rectum (R. 263). He made no complaint whatsoever of injury or pain along the back of the spine (R. 263), nor in the area of the fourth or fifth vertebra (R. 282). He had a temperature of 101 degrees (R. 266). He complained of feeling sick generally (R. 263). The examination disclosed that plaintiff had a rectal abscess which was swollen and very sensitive to even slight palpation (R. 266). (The abscess is not claimed to have been caused in the alleged railroad accident.) It was Dr. Householder's opinion that plaintiff's subjective complaints of pain were caused solely by the abscess (R. 266) and it was operated on immediately (R. 267). Further examination at that time revealed absolutely no objective evidence of back injury (R. 270, 271, 272, 275), although certain degenerative changes of the back were observed from X-rays and diagnosed as hypertrophic arthritis (R. 271, 273).

Plaintiff returned from Chicago and resumed working on February 28, 1950. On March 9, 1950, he wrote and signed a letter in his own handwriting to defendant's district claim agent (R. 105, 106, Ex. D), the body of which was as follows:

> "I have recovered from my recent injury sufficiently to return to work as a locomotive engineer on the K. C. divi-

sion at Ottumwa, Iowa on the 28th day of February. I would appreciate settlement at your earliest convenience."

After resuming work, plaintiff continued working without interruption for six months until August 28, 1950, when he again laid off (R. 40). During this period he worked more steadily and received more wages than he had at any time in the four years preceding his claimed accident of November 12, 1949. Exhibit A (R. 87). In 1946, plaintiff's total wages were $3,867.56 with monthly average of $322.92. In 1947 his total wages were $3,884.40, and a monthly average of $241.97. In 1949 his total wages through October were $4,392.75 and a monthly average of $439.28. After the accident for six months, March to August, he earned $2,845.89 and a monthly average of $474.42. In 1948 for the first four months he earned $297.67 with a monthly average of $74.42. It seems clear his arthritis or other illness for four years before the claimed injury of November 12, 1947, probably prevented him from working regularly.

He said he started wearing a body brace in April, 1950 (R. 41). He was admitted to the Ottumwa Hospital about September 1, 1950 (R.43) and remained a week. On the basis of his subjective complaints (R. 277, 278) he was again admitted to the Wesley Memorial Hospital in Chicago on September 26, 1950 (R. 275), and remained until December, 1950 (R. 45). During the latter period he was attended and treated by Dr. Householder (R. 275) and later he was examined by Dr. Conley, head of the Orthopedic Surgery Department of the 4000-bed Cook County Hospital, the Oak Park Hospital and Chicago Memorial Hospital (R. 329). Both of these doctors testified that plaintiff had a degenerative condition of the back which could only be diagnosed as hypertrophic arthritis (Dr. Conley, R. 337, 343, 344; Dr. Householder, R. 269, 271, 273); neither doctor could find

any objective symptom of back injury (Dr. Conley, R. 340, 341, 342, 346; Dr. Householder, R. 270, 271, 272, 273, 275, 284, 285). The same opinion was expressed by Dr. Yoerg who examined plaintiff just before the trial (R. 378, 379, 396, 411, 412).

Plaintiff returned to Ottumwa in December, 1950, and claims to have remained under the care of Dr. Nelson up to the time of trial (R. 46). Plaintiff also admitted that between November, 1951, the time of the bridge accident and the time of trial he had seen Dr. Nelson very often (R. 517, 518); that Dr. Nelson had operated on him for a cyst in January, 1952 (R. 518); that during that time (November, 1951, to March, 1952) he had become very nervous and irritable and had a stomach disorder (R. 520); that Dr. Nelson had treated him for these conditions and that they were all "tied together" with his back condition (R. 520). Defendant, of course, has no way of knowing how much plaintiff was confined after the bridge accident.

Plaintiff claimed that as a result of his injury he doesn't sleep well (R. 49). The records of the Wesley Memorial Hospital show that from January 18, 1950, until February 10, 1950, plaintiff "slept well," "slept good," "slept comfortably" (Ex. 5). The same observation on the records are noted during his later period of hospitalization from September 26th to November 22nd, 1950.

Dr. Bratrud, plaintiff's only medical witness, had not treated plaintiff and had examined him only once and that was on February 28, 1952, three days before the case was tried (R. 54). Dr. Bratrud testified that plaintiff had marked hypertrophic arthritis (R. 63, 65, 73), which is ordinarily a progressive thing that becomes increasingly worse (R. 74), and that he may have had that condition for 10-15 years (R. 74). He also had an enlarged prostate which may be disabling (R. 58, 75). It was further Dr. Bratrud's opinion

based solely on his examination of February 28, 1952, that plaintiff had a prolapsed or injured disc between the fourth and fifth lumbar vertebrae and an aggravation of his pre-existing arthritic condition (R. 67). Dr. Bratrud also testified that with such an arthritic condition as plaintiff had, any injury or trauma *always* causes an aggravation and such an aggravation always causes pain (R. 66).

Dr. Yoerg, a witness for defendant, also examined plaintiff shortly before the time of trial and testified that in his opinion plaintiff was not in condition to work *at that time* (R. 378).

On cross examination, the plaintiff reluctantly admitted that on November 23, 1951 (more than two years after the date of his alleged railroad accident), he was involved in a serious automobile accident (R. 107, 108). It is defendant's position that the disabilities plaintiff complained of at the time of trial were caused in whole or in part by this automobile accident.

The nature and seriousness of this accident was disclosed by the testimony of witnesses Young, Kemp, and Lippincott. Young, Ottumwa City Police Officer, was on duty the night of November 23, 1951, and in response to an accident call, went to the Blackhawk Bridge on the outskirts of the city (R. 472). There he discovered a demolished automobile identified as belonging to plaintiff (R. 474, 475). The automobile was found on the ground some 12 or 15 feet below the floor of the bridge, resting on its top, the wheels in the air (R. 474). The surface of the highway was somewhat upgrade and was dry and not slippery (R. 469, 474). There had been a heavy guard rail on the bridge, consisting of upright posts 4x4 inches or 4x6 inches in thickness (R. 466) and longitudinal planks 2x4 inches and 1 inch or 2x6 inches in size (R. 466). As shown in photographs, Exhibits E, F and G, these upright posts were five or six feet apart. Plaintiff's

automobile had sheared off and destroyed 10 feet of this heavy guard rail on the left side of the bridge (R. 465) and then gone across the bridge and also sheared off 60 to 70 feet of the posts and rail on the right side of the bridge (R. 467) (this would be approximately 12 to 14 of the substantial upright posts and guard rails). The plaintiff's hat and driver's license were found in the car but he was not present (R. 474, 475). The officers looked for his body in the weeds (R. 476). Shortly thereafter the plaintiff came into a restaurant in Ottumwa near the scene of the accident where he was observed by witness Kemp (R. 455). The plaintiff was bareheaded, presented a disheveled, mussed-up appearance, and there was mud and dirt on his clothes on one side only (R. 460, 461) (probably caused by his having been thrown out or by his having crawled out of the car in the mud below the bridge). There was vomit on his clothing (R. 462). Kemp then went to the Blackhawk Bridge and observed the same physical conditions as had Police Officer Young (R. 463-467). On November 24, 1951, the morning after the bridge accident, Deputy Sheriff Lippincott, of Wapello County, Iowa, who was another wholly disinterested witness, went to plaintiff's home for the purpose of serving an arrest warrant on him and to take him in custody to downtown Ottumwa for leaving the scene of an accident (R. 477, 478). During the entire interview with Deputy Sheriff Lippincott the plaintiff remained seated on his davenport and did not attempt to stand up (R. 478, 480). Plaintiff had a bandage on his forehead and stated to Deputy Sheriff Lippincott that "He wasn't feeling well enough to go to town that morning" (R. 479). The blow on the head and vomit on his clothes would justify the jury in finding he had concussion in the fall. It is plaintiff's contention that he did not sustain injury to his back nor aggravation of the back's existing condition in this bridge accident. His version of the bridge accident is

that he was moving along at only five or six miles per hour, that the bridge was a sheet of ice as a result of which his car started to skid, that he slowed the car to about two miles per hour and that he then stepped out of the car as it was moving and before, as he said, the car "crashed" (R. 107) into the guard rail on the right side of the bridge and plunged to the ground (R. 107, 108). Plaintiff did not attempt to explain how he could have stepped out of a car moving at such a terrific rate of speed as to shear off 60 to 70 feet of the heavy upright posts and longitudinal planking on the right side of the bridge. Plaintiff further testified that the car only fell five feet to the ground, instead of the 10 or 15 feet estimated by all the other witnesses (R. 107-115). Either fall would cause a serious jolt.

Dr. Bratrud, plaintiff's only medical witness, who testified that the plaintiff had marked hypertrophic arthritis (R. 63, 65, 73, 74), further testified that any injury or trauma "always" causes an aggravation of such condition (R. 66), and that such aggravation always results in pain (R. 66). Dr. Bratrud had not treated plaintiff and had examined him only once three days before trial, and then merely for the purpose of testifying as to the plaintiff's condition at that time (R. 53, 54). Dr. Bratrud was the only medical witness to find any objective symptom of back injury (R. 67), and since he had not seen plaintiff until well after the date of the bridge accident, his opinion and testimony were thus necessarily based on plaintiff's condition *after* the bridge accident, which of course indicates that the back condition which Dr. Bratrud found could have been caused by the bridge accident or by the alleged railroad accident, or both. The doctors who examined and treated plaintiff *before* the bridge accident could find no objective evidence of back injury (Dr. Householder, R. 270-273, 275, 284, 285; Dr. Conley, R. 340, 341, 342, 346). Dr. Yoerg, defendant's witness, who

had not seen plaintiff until after the bridge accident, testified that plaintiff was not in shape to work at that time (R. 378), and that a fall such as plaintiff must have sustained in the bridge accident could aggravate an arthritic condition of the back (R. 410).

Obviously, if the testimony as to the bridge accident had not been stricken, the jury certainly could have properly found the shock of plaintiff's automobile breaking the heavy guard rail, about 14 posts, falling 10 to 15 feet and having the automobile land upside down on the ground below the bridge would aggravate the arthritic condition of plaintiff's back. The hospital record shows that on January 18, 1950, the plaintiff weighed 190 pounds (R. 344, Ex. 5, p. 61); on September 26, 1950, he still weighed 190 pounds (R. 343, Ex. 5). The hospital record of September 26, 1950, states: "He doesn't complain of recent weight loss" (Exhibit 5, page 3). Again, on March 29, 1951, Dr. Conley weighed plaintiff and found he still weighed 190 pounds (R. 344). Plaintiff weighed 160 pounds at the time of the trial (R. 115). The records therefore show for 16 months from the alleged railroad accident on November 12, 1949, or at least until March 29, 1951, plaintiff's weight remained constant at 190 pounds (R. 343, 344, 407, 408, Ex. 5). There is no record available to defendant of the plaintiff's weight after March 29, 1951, up to the time of the trial in March, 1952. However, during that 12-month period, plaintiff's weight dropped 30 pounds from 190 pounds to 160 pounds. The bridge accident occurred during this period and if the Court had not stricken the testimony as to the bridge accident, the jury could have properly held the loss in weight all occurred after the bridge accident.

At the conclusion of the testimony relating to the bridge accident, plaintiff's motion to strike all the testimony relating thereto was granted over defendant's objection, and the

matter was withdrawn from the consideration of the jury (R. 482, 483), it being held that as a matter of law there was no evidentiary basis to establish that on November 23, 1951, plaintiff was in an automobile accident of such a nature as to cause injury to his back or to aggravate the pre-existing arthritic condition of the back or to cause any disability complained of.

The jury returned a verdict in plaintiff's favor on March 8, 1952, in the amount of $86,560.00 (R. 614). The trial court found that the amount of the verdict was grossly excessive and not supported by substantial evidence (R. 638, 639) and for that reason made an order granting defendant a new trial unless plaintiff consent to an arbitrary reduction of $26,560 (30 per cent of total amount of the verdict) (R. 637). The plaintiff so consented (R. 639).

In the State Supreme Court, among various grounds, defendant asserted a new trial should be granted because such a substantial remittitur showed the verdict was grossly excessive and must have been the result of passion and prejudice and was in conflict with the decision of this Court in *M. St. P. & S. S. M. Ry. Co. v. Moquin,* 283 U. S. 520, 521, 51 S. Ct. 501, 75 L. Ed. 1243, 1244 (1931), a case brought under the Federal Employers Liability Act, in which this Court said:

> "In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent."

See petition for rehearing in the State Supreme Court, pages 24 to 26.

We have set out some of the testimony in more detail than we ordinarily would do in order that the Court may see that the trial court presented fact questions to the jury even though the overwhelming testimony of other witnesses disputed the unsupported testimony of the plaintiff and then when defendant presented testimony of two disinterested police officials and one railroad employe to show that plaintiff must have been substantially injured in an automobile accident at the Blackhawk Bridge the trial court said the unsupported, unbelievable story of plaintiff as a matter of law had to be believed and the jury could not consider the testimony of the three defendant's witnesses.

We believe the decisions of this Court mean that the defendant as well as the plaintiff under the Federal Employers Liability Act is entitled to a jury determination of facts and the trial court had no right to determine as a matter of law that it believed the testimony of the plaintiff and did not believe the testimony of City Police Officer Young, Deputy Sheriff Lippincott and railroad employe Kemp.

If the case had been brought at Ottumwa, Iowa, near where the plaintiff and all three of the witnesses named lived and near where the two accidents occurred, the Iowa Court and jury very likely would have disagreed with the plaintiff.

If the testimony with reference to the Black Hawk Bridge accident had not been decided by the trial court, the defendant probably would have convinced the jury that whatever disability the plaintiff had at the time of trial was due to the Black Hawk Bridge accident and plaintiff's general condition, not to the claimed railroad accident of November 12, 1949.

While we believe the plaintiff failed to prove a cause of action under the Federal Employers Liability Act because the accident could not have occurred as claimed by him and while we also believe the verdict was so excessive as to indi-

cate the verdict was the result of passion and prejudice, we have decided to assert one specification of error only in this Court.

SPECIFICATION OF ERROR TO BE URGED

The Minnesota Supreme Court erred in holding that defendant was not entitled to a jury trial on the question of whether plaintiff sustained back injury or aggravation in the Black Hawk Bridge accident.

REASONS FOR GRANTING THE WRIT

The question respectfully submitted in this petition is exclusively of a federal nature since it relates solely to the rights and liabilities created by the Federal Employer's Liability Act, Title 45 *U. S. C.*, Section 51, et seq.:

> "The rights which the Act (F. E. L. A.) creates are *federal* rights protected by *federal* rather than local rules of law." *Bailey v. Central Vermont Ry., Inc.*, 319 U. S. 350, 352, 63 S. Ct. 1062, 1063, 87 L. Ed. 1444, 1447 (1943).

As will be more specifically discussed hereinafter the question presented is of particular significance in the uniform adjudication of these federal rights, its determination having import far beyond the particular parties and facts involved herein.

It is submitted that the decision of the Court below is in direct conflict with the applicable decisions of this Court and with the principles of this Court's holdings because the right which Congress has granted to *litigants* in action brought under the Federal Employer's Liability Act (hereafter referred to as "F. E. L. A.") to have disputed questions of fact resolved by the jury, was denied defendant when the trial court struck from the the record the testimony of witnesses Young, Kemp and Lippincott. The stricken testimony

established that two years after plaintiff's alleged railroad injury and three and a half months before trial, plaintiff was in a serious accident when he and the automobile he was driving crashed through the guard rail of the Black Hawk bridge, dropped 10 to 15 feet to the ground and overturned. The impact was of such force as to mow down 10 feet of heavy upright guard posts and longitudinal planking on the left side of the bridge and 60-70 feet of the guard posts and planking on the right side of the bridge. The stricken testimony, together with other evidence, particularly medical, much of which is not controverted, created an evidentiary basis from which the jury could have reasonably inferred that the disability plaintiff complained of at the time of trial, three and a half months later, was caused in whole or in part by a back injury or aggravation sustained in the bridge accident.

The independent resolution of this disputed question of fact by both the trial court and the Minnesota Supreme Court is not only legally erroneous but also ignores the strict and repeated pronouncements of this Court in reference to the separate function of the jury and the Court in F. E. L. A. cases.

The jury's function was defined in *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 68, 63 S. Ct. 444, 451, 87 L. Ed. 610, 618 (1943), as follows:

> "It appears to be the clear Congressional intent that, to the maximum extent proper, questions in actions arising under the Act should be left to the jury * * *"

This was amplified in *Bailey v. Central Vermont Ry., Inc.*, 319 U. S. 350, 353, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444, 1447 (1943):

> "The jury is the tribunal under our legal system to decide that type of issue (Tiller v. Atlantic Coast Line R. Co., supra) *as well as issues involving controverted evidence.* Jones v. East Tennesee, V. and G. R. Co., 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478; Wash-

> ington and G. R. Co. v.McDade, 135 U. S. 554, 572, 10 S. Ct. 1044, 1049, 34 L. Ed. 235. *To withdraw such a question from the jury is to usurp its functions.*"

The distinction between the jury's function and that of the Court was clearly defined in *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520, 525 (1944), as follows:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions, that which it considers *most reasonable.* * * * *That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored.*"

In *Lavender v. Kurn*, 327 U. S. 645, 652, 653, 66 S. Ct. 740, 744, 90 L. Ed. 916, 922 (1946), it was held:

> "Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury."

This Court has also recently held that it is exclusively the jury's function to resolve conflicting questions of fact that arise in relation to *defenses* asserted in an action under the F. E. L. A. *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U. S. 359, 72 S. Ct. 312, 96 L. Ed. 398 (1952).

The test of whether there is a sufficient evidentiary basis to submit an issue of fact to the jury was stated in *Wilkerson v. McCarthy*, 336 U. S. 53, 57, 62, 69 S. Ct. 413, 415, 418, 93 L. Ed. 497, 502, 505 (1949):

> *"It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need only look to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given."*
>
> * * * * *
>
> *"And peremptory instructions should not be given in negligence cases 'where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences.'"*

On the basis of the foregoing decisions of this Court and particularly the standard established in *Wilkerson v. McCarthy*, supra, it is clear that the evidence in relation to the bridge accident when viewed in the light most favorable to defendant created a jury issue.

The erroneous nature and prejudicial effect of the decision below on this question is emphasized by the *peculiar inconsistency* between the lower court's holding on the question of the happening of the alleged railroad accident and the happening of the admitted bridge accident.

It is to be recalled that the only evidence to support plaintiff's claim as to the happening of the alleged shaker bar accident, is plaintiff's own personal, self-serving testimony, the credibility of which was completely destroyed by the testimony of witnesses on both sides, including plaintiff's own son.

Defendant's witnesses Brossard and Corr, both intimately acquainted with the physical construction and design of the grate shaking equipment, as well as William E. Woodrow, Jr., plaintiff's own son, whom plaintiff called as his own wit-

ness, all testified that in order to open the grates to such a width as to permit one to insert a clinker rod, or "slide hook," knock out the clinkers and shove the live coals ahead onto the front sections of the grate, as plaintiff said he was doing, the shaker bar would have to be moved forward toward the boiler head and that in order to then close the grates the shaker bar would have to be moved backward in the direction of the tender (Brossard, R. 232, 240; Corr, R. 441, 446; Woodrow, Jr., R. 547, 548).

There was further testimony that the physical construction of the shaker bar was such that when it was properly placed over the tapered shaker stub on the grate lug, it could not possibly slip off on lateral motion, but only when pulled directly upward, and even then it frequently had to be hammered (R. 19, 20, 155, 156, 234, 237).

Fireman Boyd had personally used the grate shaking equipment in question many times on the day of plaintiff's alleged accident, both before and after plaintiff claims to have been hurt, and found nothing at all defective or unusual in its operation (R. 156, 164). There is also testimony of fireman Storey to the same general effect (R. 191, 192).

Even the plaintiff himself did not contend that such an accident had occurred until almost two years later when a lawsuit was started. Plaintiff saw his fireman, Robert Boyd, a few minutes after the accident is now said to have taken place, and made no comment to him, that he had been "violently thrown against the boiler head" (R. 149, 150); nor did he tell Boyd that the grate shaking equipment was defective and dangerous although he knew that Boyd would have to and did use this same equipment on the rest of the train's run from Powersville, Missouri, to Ottumwa, Iowa. Plaintiff also failed to mention the accident, the claimed injury, or the alleged fact that the grate shaking equipment was defective to Robert A. Thomas, the conductor in charge of

the train (R. 219-221). In making his engine condition report for this date, it was plaintiff's duty to report any unusual or defective condition of the engine in order that it might be repaired; however, at that time he made absolutely no reference to the shaker bar being worn and dangerous, nor to the grate rods being caught, bent, sprung and otherwise defective as he started claiming almost two years later (R. 97-99).

It should also have been significant to the lower court that on January 18, 1950 (about eight weeks after the claimed accident), the plaintiff told Dr. Householder how the alleged accident occurred. At that time he made no claim that the grate shaking apparatus had been defective; he made no claim that the shaker had come loose; and although directly related to the diagnosis and treatment of his condition he made no statement to the doctor that he had been thrown against the boiler head, striking his back (R. 265). Instead it was his story *at that time* that he had experienced a sudden and otherwise unexplained pain in his back while bent over shaking grates (R. 264, 265).

Plaintiff told the same story to claim agent McLaughlin in June, 1950, and expressly stated that the grate shaking equipment was not defective (R. 485, 486).

It is also important that even before the alleged shaker bar accident plaintiff's general physical condition was not good. He had been suffering from "marked hypertrophic arthritis" for many years (R. 63, 65, 73, 74, 269, 271, 273, 337, 343, 344). This alone is often disabling, but he also had an enlarged prostate (R. 58, 75); he had rales in his chest from being gassed in World War I (R. 74, 75); he had a rectal abscess which required surgery (R. 266, 267). As a result of this generally poor health, plaintiff had not worked regularly prior to the alleged shaker bar accident on November 12, 1949. However, for the six-month period from March

to August, 1950, he worked more regularly and made more money than at any time before the alleged railroad accident (Ex. A, R. 87).

In view of all these facts, not to mention the other medical testimony in the case, which is discussed in other portions hereof, it is clear that the story plaintiff related at the time of trial was opposed by his earlier statements and was not only improbable, but impossible. It is unquestionably true that when determining whether there is sufficient evidence to submit a factual issue to the jury, a court is duty bound to view the evidence and inferences therefrom in the light most favorable to the party asserting the issue. But, it does not follow that a court must blindly accept plaintiff's version of the happening of an accident as true where it is contradicted by immutable physical facts and by testimony of witnesses on both sides.

However, such questionable testimony, alone, was held by the courts below to create an evidentiary basis for the submission of the liability issue to the jury.

At the trial plaintiff made a weak and incredible attempt to explain away the bridge accident. But in ruling on this issue the courts below accepted his story as true *as a matter of law,* and in an abrupt about-face, adopted a conflicting and highly restricted view of the jury's function in direct disregard of the applicable decisions of this Court. The gross inconsistency between these two holdings of the lower court is shocking.

Had the courts below viewed *all* the evidence in relation to the bridge accident in the light most favorable to defendant and applied the test established by this Court in *Wilkerson v. McCarthy,* supra, the following would have been shown:

1. Since plaintiff's automobile collided with the upright guard posts 4" x 4" or 4" x 6" in thickness (R. 466) and with the longitudinal planking 2" x 4" and 2" x 6" in dimen-

sion (R. 466) with such tremendous force as to shear it off for a distance of 10 feet on the left side and then to cross to the other side and shear off 60-70 feet on the right side (R. 465-467) and since the surface of the highway was dry (R. 469, 474), the car must have been moving at a terrific rate of speed—much too fast to permit plaintiff to have stepped out as he now claims.

2. This impact alone subjected plaintiff's person to a severe jolt or concussion.

3. Since the car was moving much too fast to permit plaintiff to step out and since his hat was found in the car (R. 474), and since his clothes were covered on one side with mud and vomit (R. 460-462), he must have been in the car as it fell 10-15 feet to the muddy ground below the bridge (R. 474) and landed upside down or rolled over (R. 474). If not, he was thrown out of the car as it fell or as it rolled over. In either event, he was subjected to a *second* traumatic jolt or concussion.

4. Either one of the concussions which plaintiff's body received in the bridge accident was greater than he could have received in the alleged and doubtful shaker bar accident on the standing engine and either concussion received in the bridge accident was sufficient to cause or contribute to the disabilities plaintiff claimed thereafter at the time of the trial.

5. Plaintiff's physical appearance at the Milwaukee Cafe immediately following the bridge accident (R. 460-462), the fact that he was bareheaded (R. 460), the fact that his clothing was soiled with mud and dirt *on one side only* (R. 460), and the fact that there was vomit on his clothing (R. 462) all substantiate the severity of the concussion plaintiff's body must have received.

6. There was a cut or bruise on plaintiff's forehead indicating that he struck it against the steering wheel or dashboard (R. 479). The fact that he was then nauseated indicates the probability of a brain concussion or other serious injury.

7. Up to the moment of the bridge accident, plaintiff was able to drive his own automobile, but the day *after* the bridge accident, according to his own admission, he was not even *physically* capable of riding as a passenger a few miles into Ottumwa in response to an arrest warrant and very possibly he was not even able to stand up (R. 479, 480).

8. On March 9, 1950, four months after the alleged shaker bar accident, plaintiff wrote a letter in his own handwriting to defendant's district adjuster stating that he had "recovered" from his alleged injury and returned to work (R. 105, 106, Ex. D).

9. Following the bridge accident, plaintiff, according to his own testimony, was almost physically helpless, but following his alleged railroad injury he worked for a long time and made more money than at any other time in his life (R. 87, Ex. A).

10. Following the bridge accident and up to the time of trial plaintiff was constantly under a doctor's care (R. 517, 518). He visited the doctor every few days (R. 519), was operated on for a cyst (R. 518), became nervous and irritable (R. 520), and developed a stomach disorder (R. 520), all of which was connected with his back injury according to his own admission (R. 520).

11. *Dr. Bratrud, plaintiff's only medical witness, had never seen plaintiff until about three and a half months after the bridge accident, and testified that at that time (after the bridge accident) plaintiff had a prolapsed intervertebral*

disc (R. 67) *and was suffering from an aggravation of his long-existing arthritic condition.*

12. *Dr. Bratrud also testified that any injury or trauma ALWAYS causes an aggravation of such an arthritic condition as plaintiff had* (R. 66), *and that such an aggravation ALWAYS causes pain* (R. 66).

13. Dr. Yoerg, a witness for defendant, like Dr. Bratrud, had not examined nor seen plaintiff until February 25, 1952, *after* the bridge accident (R. 370). While Dr. Yoerg did not find a prolapsed intervertebral disc (R. 411 and 412), he did testify that at that time plaintiff was not in a condition to work (R. 378). Dr. Yoerg also said a fall of some considerable distance would aggravate an arthritic condition of the back (R. 410).

14. The doctors who attended, treated and examined plaintiff *before* the bridge accident, both outstanding men in their profession, could find no objective evidence of back injury and recommended that he continue working (Dr. Householder, R. 270-273, 275, 284, 285; Dr. Conley, R. 340, 341, 342, 346).

15. Plaintiff sustained a 30-pound loss of weight which in all probability occurred after the bridge accident (R. 334, 344, Ex. 5, pp. 3 and 11) and clearly all occurred after March 29, 1951 (R. 344).

16. Plaintiff slept comfortably before the bridge accident according to all the hospital records in evidence, for example, see Exhibit 5, showing he "slept well," "slept good," or "slept comfortably," but *after* this bridge accident he could not sleep well according to his own testimony (R. 216).

Surely these 16 separate strands of evidence and the inferences that may be reasonably drawn therefrom created a substantial evidentiary basis from which it could be reason-

ably inferred that the disabilities plaintiff complained of at the time of trial were caused in whole or in part by an injury sustained in the bridge accident.

However, both lower courts usurped the very essence of the jury's function by independently resolving this question.

In so doing, the test established in *Wilkerson v. McCarthy*, supra, was disregarded and the evidence in relation to the bridge accident was *NOT* taken in the light most favorable to defendant. Instead, the trial court and the Minnesota Supreme Court each weighed the conflicting testimony and determined what inference each would draw if sitting as jurors in the case. In so doing, the plaintiff's view of the evidence was adopted and the court below found, for example, that the roadway was icy, and that the bridge was only five or six feet above the ground. The only testimony to support this is plaintiff's own self-serving statement and it is directly contradicted by the testimony of police officers Young and Kemp, who were wholly disinterested and said the roadway was not icy and said the bridge was 10-15 feet above the ground.

Similarly, the court below must have made the finding that plaintiff's car was only going four or five miles per hour and that while he was unable to stop the car, he stepped out of the car before it went through the bridge railing. Surely, the opposite conclusion, which seems to be almost inescapable, is clearly sustained by defendant's evidence which showed that the car was moving at such a terrific rate of speed as to shear off 10 feet of posts and planking on the left side and then to cross the bridge and shear off 60 to 70 feet of the heavy upright posts and longitudinal planking on the right side of the bridge.

Completely ignored in the lower courts' independent resolution of this factual issue is the medical testimony itself. Dr. Bratrud, the medical witness plaintiff vouched for, testi-

fied without qualification that *ANY trauma or injury will ALWAYS aggravate a back condition such as plaintiff had and that ANY such aggravation ALWAYS results in pain.*

Also overlooked is the vitally important fact that Dr. Bratrud, the only medical witness to find objective evidence of back injury, had not seen plaintiff until *after* the bridge accident. Since his entire testimony and opinions were based on plaintiff's condition *after* the bridge accident, *the injury and disability found by Dr. Bratrud could have been caused either by the bridge accident three months earlier or by the alleged railroad accident 27 months earlier.*

Since the physical facts demonstrate circumstantially that plaintiff's person and particularly his back were subjected to a concussion of much greater force in the bridge accident than in the alleged shaker bar incident, the inference is more reasonable that the injury and disability found by Dr. Bratrud were caused solely in the bridge accident or at the very least were substantially contributed to by the bridge accident. This conclusion also reconciles the conflict in medical evidence that otherwise exists from the fact that the doctors who examined and treated plaintiff *before* the bridge accident could find no objective symptoms of injury from the alleged railroad accident. Further reconciled is the conflicting evidence as to plaintiff's claims of sleeplessness and loss of weight.

To use the language of *Wilkerson v. McCarthy,* supra, "the facts are in dispute and the evidence in relation to them is that from which fair-minded men may draw different inferences," however, the lower court would not permit the jury to pass upon this material evidence but made its own independent resolution of it and must have held that the testimony of three witnesses, two of whom were clearly disinterested, in relation to the bridge accident must be disregarded and the testimony of plaintiff alone (who was not disinter-

ested) as a matter of law must be believed and the court as a matter of law should or could hold that smashing into the guard rails and falling 10 or 15 feet could not have injured plaintiff. This is manifestly beyond the function of a court, *the sole question for the court being whether the evidence taken as a whole and viewed in the light most favorable to defendant created an evidentiary basis from which the jury could circumstantially infer subsequent injury or aggravation.*

On this basis it is submitted that the decision below is in direct conflict with applicable recent decisions of this Court. This conflict in principle is particularly striking in view of the following:

> *"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when the evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."*
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> *Lavender v. Kurn*, 327 U. S. 645, 653, 66 S. Ct. 740, 744, 90 L. Ed. 916, 923.

Notwithstanding the obvious desirability of a compensation law which would protect railroad workers from the consequences of injury on an insurance principle, extreme concern has been expressed over the tendency of some State Courts to administer the Federal Employer's Liability Act as if it were a Workmen's Compensation Act. The decision of

the Minnesota Supreme Court herein goes even further, and would permit "compensation" for an injury sustained in an automobile accident not connected in any way with plaintiff's employment.

National uniformity in the adjudication of the federally created rights and liabilities of the F. E. L. A. requires strict conformity to announced Federal standards on the part of the State Courts. In *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U. S. 359, 361, 72 S. Ct. 312, 314, 96 L. Ed. 398, 403 (1952), it was stated:

> "We granted certiorari because the decision of the Supreme Court of Ohio appeared to deviate from previous decisions of this court that federal law governs cases arising under the Federal Employer's Liability Act, 342 U. S. 811, 72 S. Ct. 59."
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> * * * * *
>
> "Manifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what *defenses* could and could not be properly interposed to suits under the Act. Moreover, only if federal law controls can the federal act be given that uniform application throughout the country essential to effectuate its purposes."

In particular, the failure of State Courts to respect the jury function in F. E. L. A. cases has frequently motivated the exercise of this Court's discretion to grant certiorari.

> "We granted certiorari because of important problems as to Petitioner's right to a jury determination of the issue of causation."
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> *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 30, 64 S. Ct. 409, 410, 88 L. Ed. 520, 522 (1944).

> "Our duty to review certain cases of this nature is settled."
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> *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U. S. 430, 431, 70 S. Ct. 226, 228, 94 L. Ed. 236, 239 (1949).

"It was because of the importance of preserving for *litigants* in F. E. L. A. cases their right to a jury trial that we granted certiorari in this case."

Wilkerson v. McCarthy, 336 U. S. 53, 55, 69 S. Ct. 413, 414, 93 L. Ed. 497, 501 (1949).

In the latter decision, a concurring opinion analyzes 55 petitions for certiorari in F. E. L. A. cases and makes the following significant comment:

"From this group of cases three observations can be made:

"(1) The basis of liability has not been shifted from negligence to absolute liability.

"(2) *The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected.*

"(3) The historic role of the jury in performing that function * * * is being restored in this important class of cases."

CONCLUSION

The question presented herein is unusual in that here it is an employer rather than an employee who complains of the deprivation of the right of jury trial. However, the principle involved here is *identical* with the principle in those many cases where this Court has granted certiorari on petition of an injured employee.

Upon the grounds and for the reasons stated herein, it is respectfully submitted that the decision of the Minnesota Supreme Court is at variance with the applicable decisions of this Court and that a writ of certiorari should be granted.

Respectfully submitted,

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